In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1359

ALEX J. JUDICE AND W. R. MERRITT, SR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Mississippi, petitioners were convicted of possessing an unregistered firearm and transferring the firearm without paying the required tax, in violation of 26 U.S.C. 5861 and 5811. Each was sentenced to imprisonment for two years on Count 1 and given a suspended sentence on Count 2 with a five year period of probation to commence after release from service of the sentence on Count 1 (App. 1-2, 311-314).[1] The court of appeals

[1] "App." references are to the appendix before the court of appeals.

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affirmed (Pet. App. 1a–7a) and subsequently denied rehearing (Pet. App. 1b–4b).

The evidence, which is summarized in the opinion of the court below (Pet. App. 4a–6a), shows that on April 16, 1969, Internal Revenue Agent Holt, accompanied by another agent, went to Pap's Reloading and Furniture Supply Co. in Biloxi, Mississippi, and asked the proprietor if he knew anybody who could supply him with automatic weapons (App. 100–101, 162–163). After some conversation, the proprietor introduced Holt to petitioner Judice. Holt said that he was a volume buyer of automatic weapons and that what he purchased would be out of the country within seventy-two hours. Judice said he could supply such weapons and suggested that Holt return the next evening (App. 100–105).

Upon Holt's return the following evening, the proprietor had him talk over the telephone with a person named "Ray," who later proved to be petitioner Merritt. They discussed the purchase of a fully automatic carbine and it was agreed that Holt should return later in the evening. At this later meeting, at which Judice was also present, Merritt showed Holt an automatic carbine, and Holt agreed to buy it. Merritt said he could supply an automatic rifle, a German Schmeisser, an M–3 submachine gun, a Remington single-shot pistol with a Maxim silencer and nine-power scope, plus 5,000 rounds of ammunition, for $3,500. Holt agreed to buy the weapons, but not the ammunition, for $2,800 (App. 108–110). Merritt pulled a revolver from his hip pocket, pointing it generally at Holt's

head, and said, "[I]f you get me in the corner I will kill you and I know you will do the same." Holt, exhibiting his own weapon, said he understood, and wanted no trouble (App. 113–114).

Pursuant to Merritt's instructions, Holt and the agent who had previously accompanied him met petitioners at 1:00 a.m. that night on a remote road (App. 111–116). Holt paid for delivery of the guns with $2,800 in government funds. During this time, Judice had a shotgun pointed in the general direction of the two agents. Merritt said if Holt needed anything more to get in touch with him at Pap's store (App. 117–121, 170–174). The weapons, which were fully automatic, were unregistered (App. 121–133, 175).

Both petitioners testified at trial. While they did not remember the exact dates involved, they gave detailed accounts of what occurred. Merritt was positive that it was on a Wednesday, April 16, 1969, that Judice came to his house about this matter. According to Merritt, they had a drink together and Judice said that there was a man over at "Pap's" shop who had a suitcase full of money and wanted to buy some fully automatic weapons (App. 217). Judice told him that "they were planning another invasion of Cuba and that was recently after the Bay of Pigs Fiasco * * *" (App. 218). Merritt remembered that a Paul Woods had said he had such weapons and called him (Tr. 218–219). Merritt and Judice then went to "Pap's" and met Holt. Merritt showed him an automatic carbine he had obtained from Woods. Holt said the guns would be out of the country in seventy-two hours.

Merritt did not know whether he was dealing with a criminal, or the Mafia, and said, "Mister I hope you people are not up to anything" and opened his coat to show a gun in a holster (App. 220–221). Merritt testified that he was selling the guns for Woods, that he turned the money over to him and received a commission of $500. Merritt further testified that Woods later disappeared from the community (App. 223–225).

Judice gave a similar account of the transaction, also saying that he received a $500 commission (App. 237–251). He testified that at the delivery of the weapons he had a shotgun, but that it was not pointed at the agents (App. 256).

1. Petitioners allege that their convictions should be reversed because of a twenty-one month delay between the commission of the offence and the institution of formal charges.[2] As the court of appeals pointed out (Pet. App. 3a, 1b–4b), this claim is fully answered by this Court's recent decision in *United States* v. *Marion,* 404 U.S. 307. Nor have petitioners established that the pre-indictment delay caused "substantial prejudice" to their rights to a fair trial. *United States* v. *Marion, supra,* 404 U.S. at 324–325. There was no blurring of memories as to what had occurred. Both petitioners purported to recall exactly what had taken place, even with respect to such de-

[2] Holt stated on cross-examination that the practical reason why the matter was not earlier submitted to the grand jury was that their investigation was not completed (App. 142). Petitioners did not inquire further.

tails as the day of the week when the transaction was initiated. Nor was there the loss of a potentially valuable witness because of the non-availability of Wood, or Woods, as he was variously referred to. Wood's testimony that he was also implicated would in no way have exculpated petitioners, who, by their own admission, were fully guilty of the offenses charged. See opinion below (Pet. App. 6a). Events of the trial thus wholly failed to demonstrate prejudice to petitioners resulting from the delay.

2. Contrary to petitioner's contention (Pet. 7–8), Rule 18 of the Rules of the Fifth Circuit, providing for the placing of certain cases on a summary calendar for disposition without oral argument, does not deprive litigants of due process in the presentation of appeals. *United States* v. *Pollack,* 417 F. 2d 240 (C.A. 5), certiorari denied, 397 U.S. 917; *United States* v. *Ambers,* 416 F. 2d 942 (C.A. 5), certiorari denied, 396 U.S. 1039; *United States* v. *Blackburn,* 401 F. 2d 574 (C.A. 4), certiorari denied, 393 U.S. 1022.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1972.

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